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May 26, 2005

By Email to:
Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463
Email: internet@fec.gov,
internettestify@fec.gov

Re: *Comments Concerning Notice of Proposed Rulemaking Regarding 11 C.F.R. Parts 100, 110, and 114, "Internet Communications"* (Notice 2005-10)

Dear Mr. Deutch:

Attached are comments, incorporated herein by reference, by the James Madison Center for Free Speech in response to the above-referenced Notice 2005-10. 70 Fed. Reg. 16967.

Mr. James Bopp, Jr., General Counsel for the James Madison Center for Free Speech, wishes to testify orally concerning the proposed rulemaking at the hearing scheduled for June 28-29, 2005.

Sincerely,

BOPP, COLESON & BOSTROM

/s/ James Bopp, Jr.

James Bopp, Jr.
Richard E. Coleson

1 Attachment [P:\Madison\Madison Center FEC Internet comments (2005).wpd]

Comments Concerning Notice of Proposed Rulemaking Regarding 11 C.F.R. Parts 100, 110, and 114, "Internet Communications"[1]

By the James Madison Center for Free Speech

To the Federal Election Commission

Prepared by James Bopp, Jr. & Richard E. Coleson

Due June 3, 2005

Introduction

When the American experiment was fresh from the hands of its Founders, an American could speak his mind on any subject of public interest without having to think about governmental restriction. An American could print and distribute whatever she wanted on any topic concerning the commonweal, even (and especially) on political matters. In America, one American could freely associate with others to amplify their voices in the marketplace of competing ideas and voices, which marketplace was considered the surest means of establishing truth. Liberty was the spirit of the age.

Liberty was no mere fad with the Founders. It has been an ideal in Western civilization at least since the Greeks defeated the Persians at Marathon, Salamis, and Plataea. People who value liberty still honor the valiant sacrifice of the Spartans at Thermopylae in delaying the advance of Xerxes. Athens established a democracy to which people cast longing backward glances for centuries. In the years leading up to America's founding, there was a burst of writing, discussion, and insight as the great conversation of mankind turned increasingly to thoughts of liberty.

America's Founders embraced liberty, threw off the British monarchy with its limitations on free expression, proclaimed the sovereignty of the people, established a Republic with strictly limited powers, and built a palisade of express rights to protect liberty from the depredations of government. To be an American meant to be free to express yourself *without a second thought* about restrictions. Libel and slander carried legal consequences, of course, but those and like limited prohibitions had been well understood by all for millennia. The people didn't need a specialist in the minutiae of statutes, rules, court opinions, and advisory opinions before they could speak or print their thoughts.

The spirit of the present age is regulation, not liberty, and a distrust of the people and of the ability of truth to come to the fore in a free marketplace of ideas. Regulatory restrictions are disguised as "reform," allegedly in the name of the common man. People must now think twice before speaking. But the common person should not need (and most cannot afford) to retain a legal specialist before speaking. And that is the effect of increasing regulation—a creeping chill

[1]The James Madison Center for Free Speech submits the following comments regarding the Federal Election Commission's notice of proposed rulemaking ("Notice") regarding amendments to 11 C.F.R. Parts 100, 110, and 114 (Notice 2005-10, "Internet Communications") in response to the solicitation of comments published at 70 Fed. Reg. 16967 (Apr. 4, 2005).

on expression and participation in self-government. The Founders understood that liberty is fragile, that it needs room to breath and strong protections, and they gave us the first and best reform, which is the First Amendment's command that "Congress shall make no law . . . abridging freedom of speech, or of the press . . . ."

In the midst of a rulemaking about the Internet—the people's great public forum and press—the first principle of liberty should be given more than passing lip service. The Madison Center writes in defense of the person of average means who wants to say and print what is on her mind and who wants to associate freely with others—perhaps in a group blog or in a citizen watchdog group (incorporated, if desired, to protect against individual liability)—without having to stop first and ask "Can I do this in America?" and having to hire a lawyer to find out.

The Madison Center's first preference for the Internet—and the option most advancing liberty and citizen self-government—is no FEC regulation. To the extent that this is not possible because of unappealed court mandate, then any regulation must be done in the most minimal degree possible. Any regulation must have extremely bright lines that are readily comprehensible by the common person, without the need to hire a lawyer, attend a seminar, or read extensive regulatory language. The common person is not stupid—in fact the Founders correctly trusted the common people (as always with appropriate checks and balances) because of their common sense—but most people have little desire to learn legalese. Nor should they have to do so. Liberty is not only for those who have learned legalese or have money for a lawyer. The guiding theme for these regulations should be that the common person should not have to think twice as to legal ramifications before posting thoughts about political matters on the Internet.

Outline

About the James Madison Center for Free Speech and Its Internet Use.

The James Madison Center for Free Speech ("Madison Center") is an internal educational fund of James Madison Center, Inc., a District of Columbia corporation recognized by the IRS as nonprofit under § 501(c)(3) of the Internal Revenue Code. Its General Counsel is James Bopp, Jr. The Madison Center's Mission Statement declares that its purpose is to protect the sort of free expression and association at issue in this rulemaking:

> The mission of the James Madison Center for Free Speech is to support litigation and public education activities in order to defend the rights of political expression and association by citizens and citizen groups as guaranteed by the First Amendment of the United States Constitution.

As do nearly all advocacy groups, the Madison Center makes use of the Internet. And as for many such organizations, Internet communications serve in lieu of a printed newsletter, but they serve the same purpose. The Madison Center offers persons the opportunity to subscribe to its "e-mail list." Those who subscribe regularly receive email communications that are most frequently styled as "press releases," but sometimes they are not so labeled, and they have been sent in letter format. They could appropriately be called "news updates," for they go to news media contacts and other contacts alike. These news updates concerning Madison Center activities are emailed to substantially more than 500 interested individuals and organizations. The Madison Center publishes these news updates when there is pertinent news to report, not on a fixed schedule. There is no volume and number on the news updates, but they are generally dated (and in any event the email header dates them). There are provisions for persons to subscribe and unsubscribe, but there is no charge for a subscription to the email news updates.

When the Madison Center started up, one of its first activities was to compile an email list to which to send its news updates. It did not pay for any of the email addresses, but it received lists of likely-sympathetic recipients by donation and collected on its own many addresses on its email list. It initially sent unsolicited emails to persons on its email list, announcing the Madison Center and its planned news updates and offering the opportunity to unsubscribe. The Madison Center invests time and effort to maintain its list, both to add and remove subscribers upon request and to deal with frequently changing email addresses. The Madison Center believes that some start-up organizations might not have access to the list resources it had and would have to purchase lists as a means of building their initial email list. It also believes that initial unsolicited emails are essential to a new organization.

The topics of the Madison Center's news updates range from Madison Center fundraising and recognition activities; to campaign finance reform legislation, rulemaking, litigation, and scholarly publications; to litigation concerning judicial cannons that improperly silence the free speech of judicial candidates.

Sometimes news updates name candidates. For example, a June 15, 2004, news update was captioned "Article Outlines Hopeful Future for Campaign Finance 'Reform' Litigation," and reported the publication of a law review article by James Bopp and Richard Coleson about litigation opportunities in the wake of the "McCain-Feingold" case decided in *McConnell v. FEC*, 540 U.S. 93 (2003). Sen. Feingold was at that time a candidate for reelection. Another example is an August 20, 2004, press release entitled "In Wisconsin Right to Life's McCain-Feingold Challenge, WRTL Files Emergency Appeal to D.C. Circuit Appeals Court." This article provided news about the lawsuit *Wisconsin Right to Life v. FEC*, challenging the electioneering communication corporate expenditure ban as applied to genuine grass-roots

lobbying. Sen. Feingold was a candidate and the article was published within the electioneering communication blackout period for his Wisconsin primary election.

The Madison Center sends its news updates using its ordinary AOL account that is also used for other email correspondence, and it maintains its addresses in AOL's address book and as files in a typical wordprocessing program. Consequently, there is de minimis cost in sending out emails, and the cost per individual email is so low as to be negligible.

The Madison Center's website, at http://www.jamesmadisoncenter.org/, makes available to the general public information about itself and its personnel and a variety of publications, such as current and past news updates, popular and scholarly articles, briefs and court opinions from its litigation, and written testimony before Congress and federal agencies. Website hosting is of modest cost and updating is done with donated time, so that the cost is de minimis. The website hosting cost is a sunken cost, making the cost of adding any new material to the website negligible.

The Madison Center has no advertising in its news updates or on its website, but has no policy against doing so. The Madison Center's income is from donations, but it would have no problem with receiving income from sale of advertising or rental of its emailing list in situations compatible with its mission.

In its various litigation efforts to protect freedom of expression, the Madison Center represents many nonprofit ideological corporations, such as the aforementioned Wisconsin Right to Life, Inc., which also send out news updates and legislative and other action alerts by email as well as maintaining websites. While these clients are not officially named as commenters here, the Madison Center also comments from concern for their interests. The Internet is now a vital and necessary tool for citizen groups seeking to participate in the "marketplace of ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

The James Madison Center believes (a) that its Internet activity is entitled to full First Amendment protection under free speech, press, and association guarantees, (b) that there should be no regulation of the activity described above, (c) that due to the Internet's unique nature it should be free from congressional limitation and agency regulation, and (d) that—to the extent the FEC is judicially compelled now to make a rule—the FEC should do the absolute minimal regulation and take great care to do no harm to the people's public forum and press.

I. This Rulemaking Should Be Based on Constitutional First Principles, Not Creeping Incrementalism.

This rulemaking should be based on the following Constitutional first principles. The people are sovereign. U.S. Const. preamble ("We the people . . . do ordain and establish this Constitution . . . ."); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("In a republic . . . the people are sovereign . . . ."). They have retained for themselves certain rights. U.S. Const. amend. X (reserving to the people or states the authority not granted to the federal government). Their retained rights to self-government through free speech, press, and association must be the starting point in this rulemaking. U.S. Const. amend. I.

In a constitutional system in which the people granted to the federal government only limited powers, it was obvious from the U.S. Constitution that the power to limit the people's speech, press, or association was not included in that grant. Yet the people were so protective of these liberties and so suspicious of government efforts to strip them of these vital self-government tools, that they expressly commanded that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

The First Amendment is designed "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)). "[S]peech concerning public affairs is more than self-expression; it is the essence of self government." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (quotation marks and citation omitted). "It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777.

The United States Supreme Court has held that the constitutional first principle of not abridging expression or association may yield to a proven compelling interest, but only where a proposed restriction is narrowly tailored to effect only that interest. *See*, *e.g.*, *Austin v. Mich. Chamber of Comm.,* 494 U.S. 652, 657 (1990); *Buckley v. Am. Constitutional Law Found.,* 525 U.S. 182, 192 n. 12 (1999); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 347 (1995). The burden is on the government to justify the restriction. *See*, *e.g.*, *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2788 (2004); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000); *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

The freedom of the press had led the Supreme Court to reject licensing and censorship schemes. *See*, *e.g.*, *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002); *Lovell v. Griffin*, 303 U.S. 444 (1938). Prior restraints require extraordinary justification. *See*, *e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) ("any system of prior restraints . . . bear[s] a heavy presumption against its constitutionality"). No control of content by government is permissible. *Near v. Minnesota*, 283 U.S. 697, 711-17 (1931). Publication may be done anonymously. *See*, *e.g.*, *Talley v. California*, 362 U.S. 60, 62-65 (1960); *McIntyre*, 514 U.S. at 341-45, 347-49 (relying on free press rationale); *id.* at 359-71 (Thomas, J., concurring that anonymity is protected by press freedom). No discriminatory financial burden by tax or regulatory burden may be imposed. *See*, *e.g.*, *Grosjean v. American Press Co.*, 267 U.S. 233, 240-41, 250-51 (1936); *Arkansas Writer's Project v. Ragland*, 481 U.S. 221, 230 (1987); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

The express press protection is not limited to the institutional news media corporations. It is guaranteed to *everyone*. "Every freeman has an undoubted right to lay whatever sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." 4 William Blackstone, *Commentaries* *151-52. In his concurrence to *Bellotti*, Chief Justice Burger noted that "[t]he Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." 435 U.S. at 798. But he proceeded to trace the development of the recognition of the right to demonstrate that "the history of the Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege." *Id.* "The common 18th century understanding of freedom of the press is suggested by Andrew Bradford, a colonial American newspaperman," the Chief Justice continued, noting that Bradford did not limit freedom of the press to any particular group:

> "But, by the *Freedom of the Press,* I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his Sentiments on the Important Points of *Religion* and *Government*; of proposing any Laws, which he apprehends may be for the Good of his Countrey, and of applying for the Repeal of such, as he Judges pernicious. . . .
>
> "This is the *Liberty of the Press,* the great *Palladium* of all our other *Liberties,* which I hope the good People of this Province, will forever enjoy . . . ." A.

> Bradford, Sentiments on the Liberty of the Press, in L. Levy, Freedom of the Press from Zenger to Jefferson 41-42 (1966) (emphasis deleted) (first published in Bradford's The American Weekly Mercury, a Philadelphia newspaper, Apr. 25, 1734).

Bellotti, 435 U.S. at 798-99 (Burger, C.J., concurring). Justice Frankfurter put it this way:

> [T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. "[T]he liberty of the press is no greater and no less than the liberty of every subject of the Queen," *Regina v. Gray*, [1900] 2 Q.B. 36, 40, and in the United States, it is no greater than the liberty of every citizen of the Republic.

Pennekamp v. Florida, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring).

This guarantee of the freedom of the press for every person arose in reaction to the government's response to a new technology that allowed inexpensive public communications to large numbers of people—the printing press. The English crown feared that with this new technology the people would discuss the governing authority and so asserted its sovereignty—in the face of growing assertions that the people were the true sovereigns—by enacting licensing and censorship schemes, approved and disapproved reading lists, and taxation on printing:

> Soon after the invention of the printing press, English and continental monarchs, fearful of the power implicit in its use and the threat to Establishment thought and order—political and religious—devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions for seditious libel, which were unknown in the pre-printing press era. Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.

Bellotti, 435 U.S. at 800-01 (Burger, C.J., concurring).

These restrictions on the people fueled the call for liberty of the press and independence from monarchy. Freedom of the press has deep American roots in the early pamphleteers for liberty and a federal constitution. Some worked alone, such as Thomas Paine who wrote *Common Sense*, a call to arms for American independence that was first printed by Robert Bell. *See* http://www.ushistory.org/paine/. He later added *The Crisis*, in support of the Revolutionary War. Sometimes they worked in association. The *Federalist Papers* were written by three individuals under the *nom de plume* of Publius: Alexander Hamilton, James Madison, and John Jay. These pamphleteers' efforts led to American independence, eliminated the government's claim to sovereignty, and for a time ended the ability of government to silence the people. The First Amendment was the first, and best, "reform" law.[2]

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[2]Free expression and press is important for several reasons. In 1644, John Milton argued against English censorship laws because they suppress truth: "Let truth and falsehood grapple: whoever knew truth put to the worse in a free and open encounter?" J. Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644). In 1859, John Stuart Mill likewise argued that free expression was necessary to the establishment of truth. J.S. Mill, *On Liberty* at Ch. II (1859). In 1919, Justice Holmes argued that only in the freely competitive "marketplace of ideas" can truth be established. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting). This is particularly important at election time, when candidates hire expensive consultants to manufacture an amalgam of winning issues, based on polls and focus group research. But the truth about the candidate can't be known

(continued...)

In recent years, however, some sanction the government once again silencing the people through licensing schemes, economic burdens, blackout periods, and the like. And some would extend this to the vast public forum called the Internet. But the Internet has been uniquely the public forum and press of the people. The place where everyman and everywoman, individually and in groups, can publish thoughts on any subject. It is a great equalizer, where persons of ordinary means can put up a website and comment on anything, just like the rich who can buy presses, newspapers, and broadcast stations. As did that famous printer Benjamin Franklin, the people now have their own press, so they can print their own thoughts. They can do so anonymously if desired, as Franklin did with his Silence Dogood letters. The Internet has been the most free and democratic public domain of modern life—a celebration of American liberty that the Founders would have applauded.[3]

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[2](...continued)
from these. Only when those pesky citizen watchdog groups come yapping in to ask about the candidate's record and real views on socially important issues, such as the environment, gun control, abortion, trade protection, that the truth comes out.

Free expression and press also permit individuals to participate in society, resulting in greater perceived and real fulfillment. *See*, *e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. Penn. L. Rev. 591, 593 (1982). This greater involvement of individuals in turn creates healthy self-government in our Republic. *See* Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 Yale L.J. 438 (1983).

Free express and press also provide a necessary safety valve for society. *See Whitney v. California*, 274 U.S. 347, 375 (1927) (Brandeis, J., concurring) ("the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies").

And free expression and press require careful protection because "once we allow the government any power to restrict the freedom of speech, we may have taken a path that is a 'slippery slope.'" John E. Nowak, Ronald D. Rotunda & J. Nelson Young, *Constitutional Law* at 836 (1986) (citing inter alia Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B. Foundation Res. J. 521.).

> Linedrawing in such an abstract area is always difficult and especially so when a government's natural inclination is moving the line towards more suppression of criticism and unpopular ideas. Thus, even if one could distinguish between illegitimate and legitimate speech, it may still be necessary to protect all speech in order to afford real protection for legitimate speech.

Id. (citations omitted). This slippery slope problem is especially problematic as the FEC now steps onto the Internet rulemaking slope, which it previously and wisely had avoided.

[3]The Internet is but the current expression and extension of the technological breakthrough that began with the printing press, which allowed low-cost mass communication. There has been a trend toward empowering the individual as the cost of producing printed communications has dropped and become more readily available. The trend includes the typewriter, mimeograph machine, copy machine, word processing, desk-top publishing, and quick-print shops. In *McIntyre*, the Supreme Court dealt with this trend at an earlier, but fairly recent stage of its progression noting that Mrs. McIntyre "had composed and printed [her leaflets] on her home computer and had paid a professional printer to make additional copies." 514 U.S. at 337. The Internet seems the epitome of this trend, making world-wide communication available at negligible cost, but of course the needs of individual empowerment will continue to drive the accelerating progression of this technology. Someday, today's Internet will doubtless be considered an old-fashioned communication device. So any rulemaking must not focus on current technology and format factors soon to be outmoded. Instead, it should focus on what activity is happening, namely, the information collection, dissemination, and commentary, which must be protected.

So if the freedom of the speech and press belong to everyone, is a so-called "media exception" permissible? In *Austin*, the Supreme Court dealt directly with an equal protection challenge to Michigan's "media exception" to its ban on corporate independent expenditures. 494 U.S. at 666-67. The Court noted that "expenditure" was defined so as to exclude "any 'expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office . . . in the regular course of publication or other broadcasting.'" *Id.* at 667 (quoting the Michigan Campaign Finance Act and footnoting the similar FECA provision at 2 U.S.C. § 431(9)(B)(i)). The Supreme Court noted that the exception did not specifically mention "media corporations," but observed that "the exception will undoubtedly result in the imposition of fewer restrictions on the expression of corporations that are in the media business." *Id.* at 667. Since the exception was not "neutral," the exception had to "be justified by a compelling state purpose." *Id.*

The *Austin* Court made three crucial comments about news media corporations that bear careful scrutiny in this analysis and in the proposed rulemaking. They must be remembered in any discussion of bloggers and other Internet information communications. First, it noted that news media corporations "enjoy the same state-conferred benefits inherent in the corporate form," but that the news "media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public." *Id.* Second, "[w]e have consistently recognized the unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'" *Id.* (quoting *Bellotti*, 435 U.S. at 781). Third, "'the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.'" *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 219 (1966)). Importantly, the *Austin* Court noted that "the press' unique societal role may not entitle the press to greater protection under the Constitution" than that enjoyed by other entities, but it held that these unique characteristics of news media corporations justified their more favorable treatment, so as to survive strict scrutiny under the Equal Protection Clause.

From *Austin*'s justification, here are the crucial question that must be considered with respect to Internet bloggers and other online news sources: (1) are their resources devoted to collecting and disseminating information to the public?; (2) do they inform and educate the public, offer criticism, and provide forums for discussion and debate?; and (3) do they serve as a powerful antidote to governmental power abuses and holding officials accountable to the people? If so, they should be included in any media exception, even though they already hold the constitutional rights to free speech and press, which in themselves protect such activity.

The necessary first-principles approach requires asking whether there are cognizable, proven, compelling interests that might justify proposed restrictions on the people. Are the proposed restrictions narrowly tailored? These are the questions that should occupy all consideration.

The alternative is an auto-expanding approach that looks only to the last judicial decision and seeks by analogy to build upon it. But the Supreme Court clearly rejected this approach in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), where it recognized a constitutionally-required exception for *MCFL*-type corporations to the prohibition (at 2 U.S.C. § 441b) on corporate independent expenditures. Instead of simply saying that MCFL is a corporation so the corporate prohibition applies, the Supreme Court went back to constitutional

first principles and engaged in a strict-scrutiny analysis. In doing so, it discovered that as applied to the given situation, the usual compelling interests were absent:

> [T]he concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL. The dissent is surely correct in maintaining that we should not second-guess a decision to sweep within a broad prohibition activities that *differ in degree, but not kind*. It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all.

MCFL, 479 U.S. at 263 (cross-reference omitted) (emphasis added). The Court continued:

> While the burden on MCFL's speech is not insurmountable, we cannot permit it to be imposed without a *constitutionally adequate justification*. In so holding, we do not assume a legislative role, but fulfill our judicial duty—to enforce the demands of the Constitution.

Id. (emphasis added).

"Constitutionally adequate justification" is what is required in the present rulemaking. It is easy to engage in creeping incrementalism, thinking that things differ only "in degree" and assuming that since *x* is permissible then it is only a step to *y* and then *z*. But this approach neglects the fact that *x* itself is far from *a* and that the constitutional justification for going from *a* to *b* must yet be present in any step from *b* to *c* and beyond.

Finally, foremost in the FEC Commissioners' minds in this rulemaking must be the icy wind that blows from the FEC's power of investigating complaints. By simply stepping into the field of Internet regulation, the FEC opens the door to complaints by adversaries and to burdensome, intrusive investigations. Complaints lead to the opening of a Matter Under Review and a letter from the FEC asking for details that, up until the complaint were private. This may lead to an investigation with even further prying into activities, generally requiring on short notice a substantial volume of information. This requires the MUR target to set aside other planned activities to focus human and financial resources on responding to the requests. Most feel the need to retain counsel, which adds to the cost. This icy chill is bad enough for large organizations with financial and legal resources available to handle such investigations. But for an individual running a blog, likely as an avocation, it could be devastating. And the fact that a blogger has incorporated does not in any way change the unavailability of resources to deal with an investigation. All incorporation means is that Joe Blogger sent in forms and paid a fee so that he is now Joe Blogger, Inc. It helps protect him from liability, but it does not make him a big corporation with lots of resources.

In Washington, the investigation is often the punishment. Bright-line rules are essential to eliminate the chill on speech that exists from investigations. For example, *Buckley*'s express advocacy test, which still governs (except for electioneering communications which were found in *McConnell* to be the "functional equivalent" of express advocacy, 540 U.S. at 206), not only provides a clear definition of prohibited conduct to guide citizens and protects issue advocacy, but it also prevents the government from chilling protected speech through burdensome and discriminatory investigations and enforcement proceedings. The express advocacy test greatly limits this chill by allowing government investigation into only those communications that are unambiguously election-related—those containing express advocacy. The burdens imposed on First Amendment rights must be considered in defining the permissible reach of government. One is the investigations necessary to ferret out alleged "coordinated expenditures." Bright-line

rules provide a simple inquiry to determine whether an investigation would be necessary, so that in a large number of cases, the inquiry may quickly end and complaints of violations may be resolved quickly, inexpensively, and without intrusion into the internal activities of organizations.

Without a such a bright-line rule, however, the FEC is free to conduct incredibly burdensome and intrusive investigations. The investigative process itself "tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957). This is so, because "[t]he mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference." *Watkins v. United States*, 354 U.S. 178, 196-97 (1957); *see also Sweezy*, 354 U.S. at 250. Such compelled disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64.

This is particularly true with FEC investigations because "[t]he sole purpose of the FEC is to regulate activities involving political expression, the same activities that are the primary object of the first amendment's protection. The risks involved in government regulation of political expression are certainly evident here." *FEC v. Florida For Kennedy Comm.*, 681 F.2d 1281, 1284 (11th Cir. 1982). Therefore, constitutional considerations require the FEC to prove to the satisfaction of the courts that it has statutory investigative authority over the party it wishes to investigate. *Id.* at 1285; *see also FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) (Because "[t]he subject matter which the FEC oversees . . . relates to behavior of individuals and groups only insofar as they act, speak and associate for political purposes," the Commission's investigative authority is subject to "extra-careful scrutiny from the court."). "The danger of treading too quickly or too blithely upon cherished liberties is too great to demand any less of the FEC." *Id.* In *Machinist Non-Partisan Political League*, the District of Columbia Circuit held that the FECA did not apply to "draft committees," based primarily on the fact that it would allow a dramatic expansion of the FEC's authority to intrude into citizens' First Amendment activities:

> [T]he subject matter of [the subpoenaed] materials represent[ed] the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and officeholding. The FEC first demands all available materials which concern a certain political group's "internal communications," wherein its decisions "to support or oppose any individual in any way for nomination or election to the office of President in 1980" are revealed . . . . Then this federal agency, whose members are nominated by the President, demands all materials concerning communications among various groups whose alleged purpose was to defeat the President by encouraging a popular figure from within his party to run against him. As a final measure, the FEC demands a listing of every official, employee, staff member and volunteer of the group, along with their respective telephone numbers, without any limitation on when or to what extent those listed participated in any MNPL activities. The government thus becomes privy to knowledge concerning which of its citizens is a "volunteer" for a group trying to defeat the President at the polls . . . [R]elease of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment.

Id. at 388 (footnote omitted).

The court in *Orloski* also recognized the danger of the chill from investigations when it stated that not only could disgruntled opponents harass by taking advantage of broad standards, but the FEC would be forced

> to direct its limited resources toward conducting a full-scale, detailed inquiry into almost every complaint, even those involving the most mundane allegations. It would also considerably delay enforcement action. Rarely could the FEC dismiss a complaint without soliciting a response because the FEC would need to know all the facts bearing on motive before making its "reason to believe" determination.

Orloski v. FEC, 795 F.2d 156, 165 (D.C. Cir. 1986).

Bright lines minimize this danger and are essential here. Of course, the best course for the FEC is to stay out of Internet regulation to the greatest extent now possible.

II. The FEC Correctly Decided that the Internet Differs in Kind, Which Requires the Most Minimal Regulation Possible of the People's Free Public Forum and Press.

Following the example of *MCFL*, 479 U.S. at 263, the first question must be: Does the Internet "differ . . . in kind" from other regulated forms of public communication? The FEC correctly decided in its 2002 rulemaking that the Internet differs in kind and so excluded all Internet communications from the definition of "public communication." The Madison Center understands, of course, that the FEC is under a court order to do something to include the Internet, so some rulemaking seems presently required. (Although it is too late now for appeal, the FEC should have appealed that court decision. And it may be hoped that current legislation will once again rescue this unique public forum from the creeping grasp of those who too lightly regard the people's liberty.) It is important to highlight, however, that the court order was based primarily on statutory construction and agency law, not a full constitutional analysis of compelling interests and narrow tailoring.[4] Ironically, the FEC might, under court compulsion, make a rule that could later be declared unconstitutional by a federal court actually engaging in the necessary strict scrutiny.

But given the present context, the FEC's current Notice is correct in reaffirming that "[t]he Internet has unique characteristics that distinguish it from traditional media." 70 Fed. Reg. at 16970. This uniqueness means that only the most minimal rulemaking must be done, imposing the absolute minimum of burden on Internet communications.

To demonstrate this difference in kind, the Notice cites various authorities to the effect that the Internet is not "scarce," "provid[ing] relatively unlimited, low-cost capacity for communications of all kinds." *Id.* (internal quotations and citation omitted). It is "not limited in format . . . [or] duration . . . [and] provides a means to communicate with a large and geographically widespread audience, often at little cost." *Id.* Internet communications are not as "invasive" as

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[4] *See Shays v. FEC*, 337 F. Supp. 2d 28, 65-71, 108-12. The *Shays* decision did say that a *complete* exclusion of the Internet from issues related to coordination with candidates and "generic campaign activity" (promoting parties, but not federal candidates) could lead to corruption, the appearance of corruption, or circumvention concerns. But it did not say there were compelling interests with respect to regulating the whole Internet, or even substantial activities thereon, and it said it was up to the FEC to determine what should be included in a new rule.

broadcast media because they require "proactive" access. *Id.* And the Internet can provide interactive communication. *Id.* The Madison Center highlights certain of these unique factors further.

A. The Internet Is Less Invasive than Most Traditional Communications.

As the FEC has acknowledged, Internet communications are less invasive than broadcast communications. *Id.* In order to access the Internet, one must log on with a browser, decide where to navigate and key in URL directions or click on existing links. Typical of such an experience is a "surfing" approach that skips from item to item of interest, with often little time spent at any one page or site. Many prefer receiving their news from Internet sources because one can tailor the news items offered by choice of site and can skip from one item of interest to another, spending as much or as little time as desired. There is no baiting by a broadcast reporter to wait for an interesting story "later in our broadcast," after listeners "stay tuned for words from our sponsors."

There is little chance of becoming a captive audience for Internet communications in the way that one might be forced to hear radio or television commercials in public waiting or transportation areas. And unlike soapbox speakers in a public forum of a park or a street corner, Internet speakers can readily be silenced with a click of the mouse to avoid them altogether or a downslide of the volume control icon to eliminate any audio component—not even the effort of walking away or putting on headphones is required. And while remote controls have made ads on favorite television programs easier to control (although requiring constant vigilance), avoidance of ads on the Internet is even easier. To be sure, there is the ongoing technical war between blockers of popup and banner ads (and spam and viruses) and those who would impose them, but that is a general technical problem (not a political corruption problem) on which progress is being made and which ought not to be the focus of *this* rulemaking. So far, the total interruption for several minutes in an hour of what one is viewing or auditing that occurs on television or radio has not occurred on the Internet. While a broadcasting corporation may need to interrupt programming on the scarce signal with commercial messages to pay the bills for expensive broadcasting, there is no such need on the Internet because of its low cost.

B. Much Internet Communication Has Little Objective Cost or "Value."

Federal law regulates things of "value," i.e., a contribution or an expenditure is defined as "anything of value," 2 U.S.C. § 431(8) ("contribution"), and (9) ("expenditure"), not things without value. For example, a corporation or labor organization is free to endorse a candidate, and declare it to the world, so long as nothing of objective monetary value is involved (or it is de minimis). 11 C.F.R. § 114.4(c)(6)(i) ("the endorsement may be made through a press release and a press conference," provided expenses are "de minimis" and press releases and notices are handled in the usual manner).

How should the "value" of Internet communications be determined? There are two accurate means. First, the FEC may calculate the "value" the same way it does for several other activities —by assessing the market value of the activity in question.[5] Market value provides an accurate

[5]One example of the FEC's use of an objective market standard to determine value is embodied in 11 (continued...)

and objective determination of the true monetary worth of any given Internet campaign activity. Second, the FEC may calculate "value" as a measure of the actual cost an entity pays for a given service or product. The Code of Federal Regulations incorporates both measures to determine "value."[6] Under either approach, much Internet activity lacks any determinable value due to its minimal worth.

The FEC already recognizes the "occasional, isolated, or incidental use" by employees of corporate or labor organization facilities in connection with a federal election as an activity not subject to regulation. Such activities are presumably not subject to regulation because of their low value and correspondingly low potential for corruption of the political process.

The evaluation of any campaign activity should not be based upon the subjective worth of the communication, but rather upon its objective worth. The Occasional Use Exemption does not analyze the value of the use of an employer's facilities in connection with a federal election under a subjective evaluation. Rather, it evaluates whether such use is subject to regulation based on objective hourly data.[7] It does not matter if the use is subjectively more valuable because it is performed by a famous employee or the president of the corporation. The exemption simply analyzes the value of the activity based on the number of hours of such use. Similarly, 11 C.F.R. § 100.7(a)(1)(iii)(A)-(B) measures costs of goods or services based on the objective "usual and normal charge" standard. Likewise, any proposed regulation of Internet campaign activity should evaluate "value" not by the subjective importance of the Internet communication but by the objective costs associated with such a medium.

Given the increasingly ubiquitous access to computers and the Internet and many established websites, the costs to the Internet communicator are largely sunken costs. People already have computers and Internet service, or they can go online for free at the library or at school. Bloggers already have their blog set up. Server and storage costs or bandwidth allocations are already paid for. These sunken infrastructure costs cannot be calculated in the communication costs any more than one would add to the taxi cost of going across town the cost of the roads, storm sewers, and traffic signals, or vehicle purchase, maintenance, licensing fees, gasoline, etc. One simply pays the incremental taxi fare. Similarly, when one pays to send a letter, the cost is the price of a stamp, not the cost to run the U.S. Postal Service and the infrastructure it uses. The incremental cost for typical Internet communications is de minimis.

A hyperlink costs almost nothing. In 2001 comments to the FEC, the Madison Center demonstrated that the effective cost of creating a hyperlink was approximately 85cents. *See* http://www.fec.gov/pdf/nprm/use_of_internet/internet_rule_comments/jas_madison_ctr_free_spch.pdf. That calculation assumed paying a content engineer the median salary for such work in a major city, not the do-it-yourself approach that many on the Internet would take. While that cost

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[5](...continued)
C.F.R. § 100.7(a)(1)(iii)(A)-(B). This provision determines the value of advertising services by the "usual and normal charge" for such a service. Further, the "usual and normal charge" consists of the "hourly or piecework charge for the services at a commercially reasonable rate."

[6]11 C.F.R. § 100.7(a)(1)(iii)(A)-(B) typifies a market value approach, while 11 C.F.R. § 114.9(a)(iii) measures value according to the cost incurred by the entity.

[7]11 C.F.R. § 114.9(a)(iii) notes that "[a]ny such activity which does not exceed one hour per week or four hours per month . . . shall be considered as occasional, isolated, or incidental use of the corporate facilities."

calculation could be recreated using current salary rates for 2005 or adjusted for inflation, it is sufficient to note that little has changed and a hyperlink still costs very little to create. Similarly, sending emails, even in large quantities, costs nothing but a bit of time. One can even have a personal website for free, if one is willing to put up with a bit of non-site-related advertising from the host. The do-it-yourself website creator using a free site has no expenditure but time.

In sum, hyperlinks, emails, websites, and blogs generally have no cognizable value for election-regulation purposes. Where dedicated websites are set up to expressly advocate for or against a candidate, and there is substantial bandwidth purchased and professionals are paid to set up the website, there may be a cognizable disbursement. And as noted in the NPRM, where there is paid advertising on a website the expense may not be de minimis. But, as discussed further *infra*, if the non-de minimis disbursement is express advocacy, it is already regulated; if it is done by a political committee, it is already regulated; if is done by a corporation or labor union, it is already regulated.

C. For Present Analytical Purposes, The Internet Is Most Like a Traditional Public Forum and Pamphleteering.

These unique characteristics reveal that the Internet is very much like communications in a traditional public forum, only with some obvious improvements. Because no one has to listen to the Internet, there is no need for reasonable time, place, and manner restrictions as there may be in the park. But the Internet is still the people speaking to one another about whatever they please, with de minimis cost.

The Internet is like traditional book publishing, with books by authors both famous and relatively unknown, old and new, all available online in a great library. Of course, what is a "book" is in transition. Clearly, tablet, scroll, or codex format is no longer required. Rather, a book is some piece of literature or collection of information of sufficiently substantial size as to have been traditionally considered to be of book length (although some books were quite short, e.g., children's books). And the traditional protection afforded book publishing must now be extended to vast quantities of material on the Internet. The Internet should also be treated like a library, in that the government doesn't control what you read. Even if it's the day before an election, you can check out and read a book about a candidate, even if it expressly advocates for or against the candidate.

The Internet is also much like the pamphleteering seen in early American history that was the focus of the guarantee of freedom of the press. While the Internet includes audio and video components, vast quantities of it are written material. The libraries of information available include information that once could only be found in books, periodicals, pamphlets, and leaflets. If Publius were writing today, would he/they have published on the Internet? Likely they would use both email and websites, although he/they might also have published the pamphlets in paper format or in letters to the editor (in a newspaper or other periodical or at on an online news and comment site). In any event, the works of Thomas Paine and Publius are instantly available on the Internet without added cost. *See*, *e.g.*, http://www.ushistory.org/paine/; http://www.yale.edu/lawweb/avalon/federal/fed.htm.

Of course the Internet also has aspects that more or less resemble an art gallery, concert hall, market, telephone, postal system, police department, court, government, and red-light district, as well as having characteristics akin to radio and television broadcasting, albeit without the expense and limited access problems.

But for purposes of the present rulemaking, the analogies to a public forum and pamphleteering are most apt, which raises the following questions. If a neo-Publius (an individual or group of persons) maintains a weblog, publishing online printed thoughts about liberty, government, war, peace, spirituality, and other items of public interest, what is to distinguish this blog from the printed pamphlets of the original Publius? How could it be possible to say that Publius was absolutely protected by the freedom of the press but neo-Publius is not? And if you can say what you want in the park or on a street corner, why can't you do so on the Internet?

D. The Internet Is the People's Press.

An apt description of the Internet, especially blogging, is that the Internet is the people's press, the place where persons of ordinary means can communicate ideas on an equal footing with the rich and famous.[8] If historically the first estate of the realm was the clergy, the second the nobility, the third estate the commons, 1 William Blackstone, *Commentaries* *153, and the so-called fourth estate was the institutional "press," then the Internet may fairly be considered the third estate's fourth estate—the people's own press.

Once it was believed that the institutional press represented the people's interests. That belief retains some currency, but increasingly the people are representing their own interests and are skeptical of the institutional press. The Internet has empowered them, and as the people are sovereign, the people's representatives and servants in government ought not to stand in the sovereign's way. At a time when many people of ordinary means feel that the fourth estate is controlled by the wealthy, that giant corporate conglomerates control media empires and create the news to their own liking, and that the institutional press has lost its trust-bond with the people because of flawed reporting and obvious but undeclared agendas, the Internet has blossomed with myriad alternate viewpoints, often reporting what the institutional press chooses, for its own agenda reasons, to withhold from the public. A profound transformation is taking place as fewer people read newspapers[9] and monitor traditional broadcast news outlets, instead picking their own news stories from sources they find credible around the world. What until recently was the "main-stream" news media no longer controls the news, although those news corporations that can adapt to new realities will still find a place and have a voice in the democratized marketplace of ideas.

In this new reality, who should be protected by a media exemption afforded to what was once called "the press"? If the people are collecting, reporting, linking, and commenting on the news, are they not doing what the institutionalized press has been doing? There is no constitu-

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[8]The notion that the freedom of the press belongs to the people shows up in some publisher/publication names, both traditional and online. A quick search on the Internet reveals that there is a book-publishing company called People's Press (Baltimore, Maryland), a newspaper called Owatonna People's Press , *see* www.owatonna.com (based in Minnesota; has paid subscribers for both paper and online versions of the newspaper; accepts paid advertising), and a newspaper called The People's Press. *See* www.peoplespressnews.com (has totally free online subscriptions; exists online and on paper; solicits articles from readers to make up the content; calls itself a "community viewspaper"; is published monthly; accepts paid advertising). All of these are obviously protected by the First Amendment guarantee of freedom of the press, although they vary considerably.

[9]*See*, *e.g.*, *Newspapers see one of worst declines, group says*, Newsday.com (May 2, 2005), http://www.newsday.com/business/ny-bzcirc0503,0,5489825.story?coll=ny-business-leadheadlines ("[c]irculation fell 1.9 percent at major U.S. newspapers in the six-month period ending in March," which was attributed *inter alia* to the Internet).

tional justification for protecting a news corporation over an individual or association if they do the same thing. It is the activity that must be protected, not the organizational form of the communicator.

There is no critical mass of net worth or circulation that suddenly creates or uncreates a constitutionally cognizable protection, so that there is no justification in pointing to a newspaper publisher's bigness over a blogger's comparative smallness. If size mattered, no newspaper would be protected by the First Amendment until it reached a certain net worth or circulation. And when circulation slips, as is happening for most newspapers, a newspaper would at some point lose its media exemption and First Amendment protection under such an approach. Are subscriptions or advertising revenue required to have the right to freedom of the press? Did Publius have subscriptions and advertising revenue? No. Nor does the Constitution require it. Nor does format properly govern what is a press activity and what is not. If a blogger lays out his webpage in newspaper format, with columns, masthead, volume, and number, and publishes his words on a published schedule, does he by reason of that format obtain First Amendment protection to be withheld otherwise? Nothing in the free press guarantee requires or justifies such an approach. Or maybe you're really a journalist and are publishing news only if you went to journalism school, but if not, sorry, no free press for you. Such elitism has no constitutional or historical justification and may be precisely the sort of hubris that has led to the declining fortunes of the so-called fourth estate.

There is no constitutionally principled way to say that a blogger employing the people's press is any less a news publisher than the *New York Times* or the *Washington Post.* While some of the current usual characteristics of the institutional news media might be convenient indices of when someone *is* entitled to the freedom of the press, they are useless for *excluding* people who are obviously collecting, reporting, linking, and commenting upon the news.[10] The Internet is different in kind, so laws and regulations applicable to other public forums may not simply be extended to it by analogy. Any restriction must meet the test of constitutional first principles.

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[10]In *MCFL*, the Supreme Court used just such indices to determine whether MCFL's "special edition" newsletter fell within the media exception. *MCFL*, 479 U.S. at 250-51. However, this was a matter of statutory interpretation, which must be limited to the facts before it (such as the facts that it dealt with a corporation and deviation from normal *newsletter* publication), *cf. McConnell v. FEC*, 540 U.S. 93, 192-93 (2003) (the express advocacy test was not a constitutional requirement but a matter of statutory construction that must be rigidly limited to the actual facts at issue in that case), and does not describe the full scope of the free press guarantee in the Constitution. The criteria of *Austin*, discussed in text, go more to the heart of the constitutional justification for any media exception and provide more guidance in the Internet context which allows instant publication, eliminating the need for volumes and numbers useful for organizing back issues of printed materials and assuring the reader that no number has been omitted in her receipt of the publication.

The Madison Center is also aware that *McConnell* rejected a constitutional claim that BCRA violated plaintiffs' rights under the "Freedom of the Press Clause," *McConnell*, 540 U.S. at 209 n.8. But that case merely said that freedom of the press provided no greater protection than freedom of expression, both still requiring the proof of compelling interests and narrow tailoring, i.e., consideration of first constitutional principles. And it did not involve Internet activity, especially of the sort done by bloggers, individually or in association.

III. Applying First Principles to the Internet's Difference in Kind Reveals that the People's Press Should Be Left Alone to the Greatest Extent Now Possible.

Applying the peoples retained liberties and constitutional guarantees to the unique features of the Internet reveals that the Internet should be left alone by the government. Since the proposed regulations are content-based, there must be strict-scrutiny-level justification, with compelling interests and narrow tailoring. This should be done despite the fact that this is a rulemaking, not litigation, because the FEC has a duty to uphold the Constitution and because the people's liberties are at issue. And it must be noted that the judicial mandate for a rulemaking concerning the Internet was based on agency law and statutory interpretation, not constitutional analysis. *Shays v. FEC*, 337 F. Supp. 2d 28, 65-71, 109-12 (D.D.C. 2004) (in fact, the FEC "provide[d] no argument as to how excluding Internet communications entirely . . . is a *de minimis* exemption," *id.* at 110). Such a mandate could not authorize abridgement of constitutional right.

It is often tempting to point to the ease with which disclaimers can be added to a communication, or to the asserted ease of reporting to the FEC, and then to ask why anyone would object to such an easy thing to do. Such an approach misunderstands the nature of First Amendment jurisprudence, the true weight and value of liberty, and the difficulty with which liberty is gained and the ease with which it is lost to creeping incrementalism.

One answer is that the required recordkeeping and more formalized structure required for a political action committee was enough of a burden in *MCFL* for the Supreme Court to recognize an exception to the independent expenditure ban on corporate expenditures for *MCFL*-type corporations. 479 U.S. at 263-64. So the burden of disclosure compliance is plainly weighty and constitutionally cognizable.

But more basically, government-mandated disclosure in and of itself, without more, is a constitutional burden of sufficient weight to require strict scrutiny. *Buckley*, 424 U.S. at 64. The government cannot with impunity compel the burden of disclosure by the people without the most weighty and tailored justification for this burden on the presumption of liberty that undergirds this Republic and specifically the rights of free expression and association. What is required is constitutional analysis, not cost analysis. Unless the FEC can justify any rule in a manner that would pass judicial strict scrutiny under the Constitution, the rule should not be promulgated.

What sort of interests must the government show? In the Constitution, the people gave no express authority to the federal government to limit their freedoms of speech, press, and association. In the First Amendment, they commanded Congress to do "no . . . abridging." So how can Congress (or the FEC) do any abridgement? The answer, according to the Supreme Court, is that sometimes there are compelling interests. So if the Internet is to be regulated, those compelling interests must be examined to see if they have any applicability to the Internet. What are the possible compelling interests for regulating the Internet? There are four recognized interests that should be reviewed for applicability.

First and second, in *FEC v. National Conservative PAC*, 470 U.S. 480 (1985), the United States Supreme Court declared that the only compelling interests for limiting free speech were corruption and its appearance. *Id.* at 496-97 ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign

finances."). "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* at 497.[11] Of course, the "appearance" interest must be used with caution, realizing that to some extent "appearance" is in the eye of the beholder. The Supreme Court has already held that communicators' rights may not be left vulnerable to the subjective understanding of the communication recipient. *Buckley*, 424 U.S. at 42-43.

Third, in *Austin*, 494 U.S. 652, the Court recognized the corporate war-chest potential for corruption, based on the potential for amassing substantial wealth with the corporate structure that then might be used to distort the political process. *Id.* at 660. However, as noted *supra*, *Austin* also said that this potential was not of cognizable concern for corporations meeting described criteria of news gathering, dissemination, and commentary, for they were constitutionally distinguishable in a way that justified their receiving a media exception. *Id.* at 667.

Fourth, in *McConnell*, the Supreme Court also recognized that certain BCRA prohibitions, including the electioneering communication corporate ban, served the compelling interest of avoiding circumvention of contribution limits. 540 U.S. at 205. This, too, requires caution, because of the potential for creeping incrementalism, i.e., if something is declared illegal, but something else is legal, then people quit doing the illegal thing and go do the legal thing; then legislators cry "circumvention!" and make the new thing illegal, so everyone moves on to another legal thing and legislators again cry "circumvention!" Where does it end? When do legislators stop crying "circumvention" and start crying "liberty!"? So-called "reform" has its fads like everything else, but the people's liberty shouldn't be subject to "reform" fads that devour their most fundamental liberties of free expression and self-government. And to be avoided at all costs is the non-cognizable conflation of "appearance of corruption" and "circumvention" into the "appearance of circumvention."

But there can only be corruption, the appearance of corruption, corporate war-chest potential, or circumvention where someone actually does something of "value," i.e., a cognizable "contribution" or "expenditure." In short, where there is no quid there can be no quid pro quo or other sort of corruption threat. Because so much activity on the Internet is uniquely of no cognizable value, there is no demonstrated corruption justifying regulation. And the usual remedies for corruption are already present in other ways, as discussed next.

IV. Expenditures for Communications on the Internet That Might Pose a Risk of Political Corruption Are Already Substantially Regulated.

To the extent there might be political corruption on the Internet despite the unique nature of the Internet, and in particular its general lack of "value," *supra*, there are already substantial regulations in place to deal with the corruption. The burden would be on the government to show why additional regulations are inadequate. And for those who complain that already-required disclosure is too slow or unsearchable (e.g., that of the U.S. Senators), the narrowly-tailored, least-restrictive solution is for those responsible for such reporting to make it more timely and accessible, not to burden the common man or woman with chilling regulations.

Anyone who makes a contribution or expenditure, as those are defined in FECA and FEC regulations, must already report the contribution or expenditure to the FEC if they reach

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[11] *Quid pro quo* literally means "what for what; something for something." Black's Law Dictionary 1123 (5th ed. 1979). Consistent with the Supreme Court's use quoted in text, the "quid" will be equated in these comments with the thing of value given in exchange for a politically corrupt favor.

prescribed thresholds. So for example, if someone pays for something "of value" on the Internet that constitutes a donation to a candidate or political committee, so as to be a contribution, or makes communications to expressly advocate the election or defeat of a clearly identified candidate for federal office, so as to be an expenditure, that must already be disclosed.

Political committees must disclose their receipts and disbursements, not just their expenditures that constitute contributions and expenditures. And they must put disclaimers on their communications. 11 C.F.R. § 110.11(a)(1). So if a political committee pays for something "of value" on the Internet, that activity is already subject to both disclaimer and disclosure by reports to the FEC that are available for public perusal. All express advocacy or contribution solicitations must already contain a disclaimer, 11 C.F.R. § 110.11(a)(2) and (3).

Corporations and labor unions are already barred from making disbursements that are "of value" that would qualify as a contribution or expenditure. So to the extent there is a concern about corporate money skewing the free marketplace of ideas, there is already an anti-corruption check in place. For those corporations that fit the description of an *MCFL*-type corporation, *see FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), so that they are exempt from the corporate ban on expenditures, those expenditures must be fully disclosed.

And fraudulent misrepresentation is already proscribed under the terms of 2 U.S.C. § 441h.

V. Comments on Specific Rulemaking Proposals.

A. Comments on the Definition of "Public Communication," 11 C.F.R. § 100.26.

The FEC proposes to modify its exclusion of Internet communications in the definition of "public communication," 11 C.F.R. § 100.26, to include "announcements placed for a fee on another person's or entity's Web site." 70 Fed. Reg. 16977.

Because of the Internet's unique nature, the FEC was correct to provide for a general exclusion of the Internet in a prior rulemaking. Now, under a court-ordered rulemaking, the FEC should do the minimal rulemaking possible under the court order, which largely left details to the FEC. But the FEC should expressly state in its final rulemaking that it makes this rule pursuant to court order and not because it has abandoned its position that the Internet is unique and merits freedom from regulation. The FEC should make it clear that it has not adopted the position that regulation of the Internet is now permissible, so that future regulations may be considered a possibility. This rulemaking must not be considered an opening of the door to Internet regulation; the door must be affirmatively re-closed after the most minimal rulemaking possible and expressly barred and sealed on the basis of fealty to the Constitution.

The use of the term "announcements" is curious because it has connotations perhaps not intended, and a quick search of 11 C.F.R. shows that it is undefined and used elsewhere to refer to notices of meeting times and places. The word was probably chosen to avoid repetition of the words "communications" or "advertisements," which were already used in the definition. But the word "advertisements" would be the perfect substitute for "announcements" because the sentence at issue is about the meaning of "general public political advertising" in the preceding sentence. "Advertising" carries the desired meaning (including the fact that is it usually for a fee), but "announcements" is confusing in the context and might raise questions of whether it was intended to be a more limited form of communication than "advertising." For example, an advertisement that says "Vote for Silence Dogood" would be universally recognized as an "advertisement," while "Silence Dogood Will Run for President" would be understood by most as an "announcement" (regardless of whether it was posted for a fee).

The limitation to Internet "announcements placed for a fee," 70 Fed. Reg. 16970, is appropriate from a statutory perspective because, as indicated by the FEC, other types of "public political advertising" in communication forms listed in the definition of "public communication" are typically placed for a fee. More importantly, from a constitutional perspective, a free "announcement," "advertisement," or "communication" on an existing Internet site (with sunken costs) could readily be likened to putting a poster favoring a candidate in the window of one's home or store. The cost is so low that it is not cognizable as corrupting to the political system under the de minimis principle discussed *supra*.

The FEC asks "[i]f a mode of communication does not cost any money, can it be 'general public political advertising, and therefore a 'public communication' within the meaning of the statute?" *Id.* The present commenter has explained *supra* that the law only reaches disbursements of "anything of value," so communications done without cost (or for de minimis cost) may not be regulated by government. There is no quid pro quo if there is no quid. So the answer to the FEC's question of whether a political advocacy speech in the public square to 500+ people is "outside the scope of 'general public political advertising'" is a resounding "Yes!" It is required by the First Amendment in the absence of any possibility of corruption because of the missing cognizable quid.

The FEC asks "is such a public speech outside the scope of an 'expenditure' or 'contribution' under the statute." *Id.* at 16971. Yes—there's nothing "of value," i.e., no quid, so no corruption possibility. These questions about non-Internet speech are somewhat curious in a rulemaking about Internet expression unless they are made to make the point by analogy that the present commenter has made, i.e., that the Internet is used by the people in the same manner as making speeches in a public square. That is, of course, a correct guiding analogy.

The FEC asks whether its "placed for a fee" proposal should include such exchanges of things of value as "comparable advertising"? *Id.* The concept of "value" is not limited to money, but care must be taken in expanding the concept of "value" to activities or things that are not the clear functional equivalent of money with a readily-discernible monetary value. For example, as discussed in the opening discussion, *supra*, there are appropriate and already-recognized methods of calculating value, which may be employed. But beyond these clear valuation methods lies a morass that must be avoided. A clear example, mentioned *supra*, is where a highly-influential person makes a phone call on behalf of some person, project, etc. The call might be valued at a quarter of a minute at that persons hourly billing rate (or something comparable), but its value in causing the desired effect may be considerably higher. However, to step into such a morass would be very poor public policy because there are no manageable ways of assuring fair calculations of value and the burden on liberty would be incalculably great. A clear example of the morass to be avoided is trying to place a value on a celebrity endorsement of a candidate. There is little cognizable monetary value under any manageable method of valuation, but the endorsement may carry great weight with an adoring fan base. But what if another segment of the populace is offended by the celebrity and a backlash effect is created by the endorsement? How to value such an endorsement would be the stuff of sociological studies, focus groups, polls, expert testimony, and the like. Liberty, free expression, and self-government, as the Founders wisely discerned, is not advanced by stepping into such a trackless swamp.

The FEC asks if it "should explicitly state that it is not including 'bloggers' in the definition of public communications." *Id.* The FEC should not do this because it should not start defining who on the Internet is entitled to protection and who is not. FEC rulemaking in this area is not

constitutionally justified, beyond the most minimal action now necessary to comply with court mandate. But the FEC should include comments on its published rules that affirm its understanding that persons who collect, distribute, and comment upon new stories—such as is done in a typical blog (some examples may be cited for clarity sake)—already clearly fit within both the First Amendment free expression/press protection and the news and commentary exemption (which is not limited to the institutionalized press/media). The FEC should avoid both the difficult task of defining both what is a "blogger" and the implied exclusion of activity not exactly fitting any definition that might be stated.[12]

The FEC asks if it should exclude from "general public political advertising" paid advertising on corporate and labor union websites with access limited to the restricted class or members. *Id.* An example might be a paid, express-advocacy banner or pop-up[13] ad placed on a union website by a candidate promoting herself. Of course, the limited-access website could already publish its own express advocacy on the website. If the FEC decides to regulate paid political advertising, the candidate's ad would clearly be subject to the regulation. The FEC has provided no rationale as to why such an ad should be exempted, but the effect would be to facilitate the activities in which the public communication definition is employed (i.e., in "coordinated communications" and "generic campaign activity"). If a paid political ad is to be officially considered a thing of value and so subject to regulation, then there seems no logic for permitting an exception. The interest in simple, bright lines should prevail, i.e., if it's a paid ad on another's website, check with your compliance person. The Madison Center understands that corporations and labor unions often are accustomed to dealing with greater regulations, and that many consequently have retained counsel for compliance review, but it still believes that there should be a simple, bright line rule for the whole Internet. That is the best way to avoid chilling the speech of ordinary individuals, including the ordinary individuals who often run citizen watchdog groups (usually incorporated) and who maintain websites.

Under the conditions described above, the FEC should adopt the proposed rule—unless, of course, some other commenter has discovered a less-restrictive means that will satisfy the court. (The present commenter is unable to think of a better line, but acknowledges the sharpening of ideas that can occur through dialogue.) This proposed definition of "public communication," 11 C.F.R. § 100.26, is bright, memorable, and less intrusive than other possible alternatives.

The FEC also seeks comment on three aspects of the application of its "public communications" definition to "federal election activity by state, district, and local party committees." First, it notes that these parties could continue to reference federal candidates on their "websites without automatically federalizing the year-round costs of maintaining such a site" and that the

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[12]The FEC cites a definition of "blog" as a "personal journal," but this is problematic if it has the common meaning of relating to an individual. Some blogs are maintained by an individual, but some are created and maintained by more than one person. There is no constitutional justification for recognizing freedom of expression or of the press for an individual but withholding it from persons in association, when the right to association is also protected by the First Amendment.

[13]The FEC asks whether pop-up ads should be considered to be "placed on" the website page. 70 Fed. Reg. 16970 n.18. If the webpage owner (the person who controls the website content) puts the pop-up ad there it should be considered "placed on" the webpage, but not if it is part of a free website arrangement and the owner cannot control the pop-up ad and its contents. This may or may not be a moot point, depending on the current flow of the battle to suppress pop-ups and to circumvent such suppression. This demonstrates the problem with regulating a rapidly-changing medium of communication.

proposed rule would continue this except as to qualifying paid ads that "PASO a federal candidate" on another's website. 70 F. Reg. 16971. This is appropriate and maintains the bright line. Second, the FEC seeks comment as to alternate approaches, *id.*, which the Madison Center does not address, believing that alternatives should not be created. Third, the FEC "seeks comment on whether any payment by [such a committee] to an outside vendor for content that PASOs a Federal candidate that is exclusively placed on the party's Web site should constitute 'general public advertising' . . . ." *Id.* This goes beyond the bright-line principle of regulating paid ads on another's website and should not be implemented in a rule.

B. Comments on the Definition of "Generic Campaign Activity," 11 C.F.R. § 100.25.

No problem is perceived with incorporating "public communication" into the definition of "generic campaign activity."

C. Comments on Disclaimer Requirements, 11 C.F.R. § 110.11.

As to the spam issue, the current regulation, § 110.11(a), requires a disclaimer on "unsolicited electronic mail of more than 500 substantially similar communications and PAC websites open to the public. So a PAC must place a disclaimer on both its public website and 500+ emailings, while an individual must place a disclaimer on express advocacy emailings to over 500 recipients.

The Madison Center agrees with the public policy value of keeping the Internet free of regulation stated at 70 Fed. Reg. 16971-72, with the statement that the Internet is like a soapbox in the public square or being a pamphleteer. *id.* at 16972, and with the statement that generally "the burden of complying with a disclaimer requirement, and the resources needed for the Commission to monitor such a requirement, could outweigh the value of disclosure." *Id.*[14] The FEC properly "is not interested in requiring disclaimers on the personal communications of private citizens," *id.*, and would lack the constitutional authority to do so.

The FEC also "is concerned" about the focus on the number of emails sent instead of "whether an expenditure was made that would justify governmental regulation." *Id.* The FEC is concerned that the term "unsolicited" may chill core political speech "that is virtually cost-free." *Id.* This concern for first principles is commendable. As noted *supra*, the Madison Center does not believe that emails are sufficiently of value to be cognizable as a possible quid in corrupting the political system. For that reason, the Madison Center supports the FEC's alternative approach of removing emails entirely from regulation. *Id.*

The Madison Center does not believe that there is constitutional justification for regulating 500+ emailings for which a fee was paid to procure email addresses. As noted *supra*, one of the Madison Center's first activities was compiling a mailing list. This is typical of most nonprofit corporations involved in any way in public policy issues. The Madison Center did not have to pay for email addresses, but other nonprofits might have to do so. An organization that may do express advocacy, which the Madison Center may not, might use its email list dozens of times before and after any email might be sent that required a disclaimer because it contained express advocacy. It would be impossible to allocate the cost of the (usually minimal) acquisition cost over many emailings and have the cost for one of those be anything but de minimis. Once the

[14]The Madison Center would add that the Internet is international, with sites hosted in other countries being readily available to American Internet surfers, further complicating the enforcement problem.

email list is in place, it is a sunken cost, and the cost of any particular emailing is virtually nil. It is not a thing "of value." And when would regulation ever stop and the list be considered the organization's own? To say 'never' would be to discriminate against groups that advocate unpopular causes, or have few connections, and so are not the recipients of free email lists. No dollar threshold (as was suggested at *id.*) fixes these constitutionally-significant problems.

And what does "unsolicited" mean? Does it have constitutional weight? As noted, when the Madison Center started up, it sent out initial unsolicited emails introducing itself and its work. There were provisions in the emails to unsubscribe, but only a small percentage of the total email list is from persons who affirmatively solicite an email. Most are persons selected because they might have an interest and who did not choose to unsubscribe. While "spam" of all sorts is a technological problem to be solved, unsolicited speech or press is not a constitutionally-cognizable category. Few people solicit speakers in public forums to hold forth on their soapbox or request a pamphleteer to give them a pamphlet. If free expression and press must await invitation, there is no such freedom. As stated above, the FEC should abandon the enterprise of regulating email.

As to bloggers who receive fees from campaign committees to promote candidates, disclosure is already required by the political committee. That is sufficient disclosure. The online community is quite adept at ferreting out such information when it chooses to do so. While there is likely an ethical duty on the part of the blogger to disclose such payments, there is no need for another rule, especially one that would not be required in other contexts. Again, this people's public forum and press needs simple, bright rules. The FEC has proposed such a rule—that (in paid ads on another's website require disclosure. It should be left at that (in addition to the already applicable regulations).

D. Comments on Coordinated Communications, 11 C.F.R. §§ 109.21 and 109.37.

In the "content prong" of the FEC's coordination rule (making certain coordinated communications into in-kind contributions) are included electioneering communications and three applications of "public communications": (a) republication of campaign materials, (b) express advocacy, and (c) targeted material released within 120 days before an election that references a political party or candidate. The *Shays* court struck down this definition and another rulemaking will address this content prong.

In this rulemaking, the FEC notes that revising the definition of "public communication" involves this coordination rule and seeks comment. 70 Fed. Reg. 16973. If the FEC incorporates in the definition of "public communications" ads placed on another's website for a fee, then that activity would be subject to the coordination regulations. This would be appropriate.

The FEC asks about things that would be excluded from the coordination rules, one being the situation where a corporation pays an outside vendor to create website content that is placed on the corporation's website. *Id.* To make this more concrete, suppose that the executives at Downtown Corporation are big fans of Silence Dogood because as a legislator she sponsored successful legislation that helped them get a toehold in a cutthroat market dominated by behemoth competitors. They paid their website developer to put a glowing biography of her on their corporate website, along with details of the legislation and the fight to enact it. The executives and vendor worked closely with Dogood to get the details of the tribute piece right. It's been up for three years, but now it's getting close to an election and Dogood is seeking

reelection. Neither the Dogood link nor tribute page contain express advocacy and is not an electioneering communication. Should it be considered an in-kind contribution?

The Madison Center does not think it should be. Congress has asserted, and the courts have approved as constitutional, interests in regulating express advocacy and electioneering communications. The courts emphasized these as bright lines, necessitated because they tread on core political speech. The FEC proposes a bright line for the Internet, which says that if it's a paid ad on another's website then it may be subject to regulation. The Dogood tribute does not fit these interests and blurs the bright line, and no other regulatory provision should or does prohibit the tribute page. The FEC's goal should be to maximize liberty, not regulation.

The FEC asks about ads placed for free on another's website. As already discussed, *supra*, the reality of sunken costs makes the "value" of such an ad de minimis, so as to not be cognizable. It is like putting a candidate's sign in your front yard. It should not be regulated.

The FEC notes that the coordination rule concerning republication of campaign materials applies to "public communications," which would now include paid ads on another's website. 70 Fed. Reg. 16973. As a result, what one does on one's own website or in an email, e.g., linking to a candidate's website, could not become a contribution by virtue of coordination rules. This is appropriate. The FEC asks with respect to 11 C.F.R. § 109.21(c)(2) if it should "exempt all dissemination, distribution, or republication of campaign materials on the Internet generally, or keep the reference in the regulation to 'public communication.'" *Id.* The Madison Center believes that there is an advantage to expressly stating that the rules do not reach the Internet. This provides easy understanding for the common person of what is covered without the necessity of cross-referencing definitions.

E. Comments on an Internet News Story, Commentary, and Editorial Exception, 11 C.F.R. §§ 100.73 and 100.132.

The FEC proposes "to indicate that any media activities that otherwise would be entitled to the statutory exemption are likewise exempt when they are transmitted over the Internet. 70 Fed. Reg. 16974. The Madison Center would, if possible, prefer a simple blanket recognition somewhere that the FEC is going to leave the Internet entirely alone because the ability to regulate, even by exclusion from regulation, implies authority to regulate. The FEC has made some positive steps in that direction in this rulemaking and will hopefully reiterate its understanding of the unique nature of the Internet in its final rulemaking.

However, short of that, it is appropriate to acknowledge that the news and commentary exception extends to the Internet. And it should make no difference whether a news and commentary source that is online also has offline publication activity. However, the wording of the proposed rules uses the following phrase: "whether the news story . . . appears in *print* or over the Internet." *Id.* at 16977-78 (emphasis added). Not all news stories, commentaries, and editorials appear in *print* because the exception extends to broadcast communications. And of course, the Internet contains video and audio material. So the word "print" needs to be revised.

But as discussed *supra*, freedom of the press is not the unique domain of the institutional press. It is a constitutional right of all. To be sure, the Supreme Court has recognized that a so-called "media exception" created by statute does not violate equal protection in light of the historic role of the institutional press/media in our society. As discussed *supra*, the information age is changing things, and some traditional news media institutions (e.g., newspapers and broadcast news programs) are on the decline in favor of more decentralized distribution of news,

especially over the Internet. This is a trend that will continue and is facilitated by the Internet, which empowers the person of ordinary means and station.

The Constitution protects the *activity*, not the *institution*. Even the wording of 2 U.S.C. § 431(9)(B)(i) focuses first on the activity and less so on who does it or the nature of the institution or medium. Consequently, the so-called "news media exception" should more correctly be called a "news and commentary exception." And the exception by statute and rule should be viewed as a "safe harbor," where protection is clearly recognized, not as the limit of constitutional protection. In deciding who fits within the safe harbor exception or within the constitutional pale, the *activity* should be examined. So as to bloggers, the question must be whether there is news gathering and distribution, commentary, and editorial. Clearly many blogs fit this described activity, having news story activity, commentary, and editorializing. And in terms of the regulation, they should be treated as "periodical publications."

As noted *supra*, there is a problem with defining blogging and with starting to expand regulations that touch on the Internet. However, the proposed rules do not attempt to define blogging and simply say that the traditional news and commentary exception extends to the Internet. The Madison Center believes this is appropriate.

A blogger receiving compensation from a candidate or political committee should be treated the same as traditional newspaper and broadcast reporters, to which no special rule applies under the current "news and commentary exception." Certainly, no more restrictive rules should be created for persons gathering and sharing news on the Internet than exists offline, and there is no justification for saying that a person receiving compensation is "controlled."

F. Comments on Exceptions to the Definitions of "Contribution" and "Expenditure" for Individual or Volunteer Internet Activity, 11 C.F.R. §§ 100.94 and 100.155.

As noted *supra*, much Internet activity has no constitutionally cognizable "value" because the cost is so de minimis as to be insufficient for the sort of quid that can corrupt the political system. The FEC proposes "new rules to address the treatment of uncompensated individuals or volunteer campaign activity on the Internet." 70 Fed. Reg. 16975. The proposed rule takes appropriate note of the sunken costs of existing equipment to which the person has access.[15]

Based on review of discussions of the proposed rules at blog sites, it is clear that there will be many comments from others on this portion of the rulemaking. The Madison Center would simply note a serious constitutional problem. All the focus on an "individual" ignores the constitutional right of association. Given the sunken costs of one's home computer, why should individual activity in creating a website, such as a blog, be treated differently if two or three individuals share the labor? There is no constitutional justification to burden the right of individuals to associate in this manner. Individual activity should be a safe haven, to be sure, but association should not be burdened.

As to the fact such activity is exempted from "coordination" possibilities, *Id.* at 16976, this is appropriate because of the de minimis "value" of the activity, as discussed *supra*.

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[15]The commentary says that the FEC "would continue to view the purchase of mailing lists (including e-mail lists) for the purpose of forwarding candidate and political committee communications as expenditures or contributions. *Id.* at 16976.

G. Comments Regarding the Use of Corporate or Labor Organization Property, 11 C.F.R. § 114.9.

The FEC recognizes that the de minimis rule as to use of corporate or labor union property for campaign activity logically extends to the Internet. *Id.* at 16977. This is appropriate.

The FEC asks whether excepting some Internet activity from the definition of "contribution" now warrants a rule to prevent corporations or labor unions from coercing employees to engage in Internet activity on behalf of some candidate or committee. *Id.* The FEC cites no evidence that this is a problem. Absent evidence of this being a problem, the Madison Center would not favor any further regulation.